In The
SUPREME COURT OF THE UNITED STATES
October Term, 1978

No. 78-862

J. EVERETT ANDERSON,

Petitioner,

vs.

MAX J. NEUBERGER AND THE BOARD OF ELECTIONS OF SUFFOLK COUNTY, N.Y., ET AL.,

Respondents.

CHARLES E. MORRIS,

Petitioner,

vs.

ALBERT HAYDUK AND THE BOARD OF ELECTIONS OF WESTCHESTER COUNTY, N.Y., ET AL.,

Respondents.

On Petition for a Writ of Certiorari To The Court of Appeals of the State Of New York

BRIEF FOR RESPONDENT BOARD OF ELECTIONS OF WESTCHESTER COUNTY IN OPPOSITION TO THE PETITION FOR CERTIORARI

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Preliminary Statement

This brief is submitted in opposition to so much of an improperly consolidated petition for a writ of certiorari which seeks to review an Order of the Court of Appeals of the State of New York, entered September 1, 1978, which unanimously

affirmed an Order of the Supreme Court of the State of New York, Appellate Division, Second Department, entered August 22, 1978, which unanimously reversed an Order of the Supreme Court of the State of New York, Westchester County which granted the petition of Charles E. Morris (hereinafter "Petitioner") and directed that his name appear on the ballot as a candidate for the Conservative Party nomination for Member of the Assembly for the 93rd Assembly District, State of New York in the September 12, 1978 primary election.

The opinion of the New York Court of Appeals is reported at 45 NY 2d 793, 409 NYS 2d 1; and it is reproduced in Petitioner's Appendix, pages 20a - 21a. The opinion of the Supreme Court of the State of New York, Appellate Division Second Department is at present reported only at 408 NYS 2d 134; it is reproduced in Petitioner's Appendix, pages 18a-19a.

The opinion of the Supreme Court of the State of New York, Westchester County has not yet been officially reported; it is reproduced in Petitioner's Appendix, pages 8a-17a.

JURISDICTION

Petitioner invokes the jurisdiction of this Court under 28 USCA 1257(3).

However, the petition for a writ of certiorari to the New York Court of Appeals in Morris v. Hayduk, et al. has been consolidated with the petition for certiorari in the case of Anderson v. Neuberger and the Board of Elections of Suffolk County, New York et al. That consolidation is improper since consolidation is permitted only where, inter alia, certiorari to review is sought to the same court. U.S. Sup. Ct. Rule 23(5), 28 USCA.

In Anderson v. Neuberger the New York Court of Appeals as a matter of discretion declined to review the order of the Supreme Court, Appellate

Division, Second Department, affirming a judgment of the Supreme Court, Suffolk County, which invalidated the designating petition of J. Everett Anderson. See New York State Constitution Article 6, Section 3(b)(6). Accordingly, the writ of certiorari must issue in that case, if at all, to the lower Appellate tribunal and not the Court of Appeals. American Railway Express Company v. Levee, 263 U.S. 19, 20-21 (1923).

QUESTIONS PRESENTED BY THE PETITION IN MORRIS V. HAYDUK

1. Whether this Court should review the Federal constitutional question posed in the instant petition for certiorari, where that question was neither presented to nor adjudicated by New York State's highest court?

2. Whether in view of Petitioner's determination not to challenge the results of the general election, and the current availability of a State judicial proceeding in which the claimed

constitutional issue can be reviewed, the instant case is moot?

3. Whether access to the ballot is unduly burdened by New York State's requirement that candidates for public office include in their designating petitions the assembly district of residence of a witness who subscribes to the authenticity of the signatures on that petition?

4. Whether certiorari to review two cases from different courts may be sought in a single consolidated petition?

STATUTORY PROVISION INVOLVED

Section 6-132 of New York State Election Law is set out in the Appendix to the Petition for Certiorari at pages 22a - 25a.

Statement of the Case

On or about July 27, 1978 a designating petition was filed on behalf of the Petitioner Charles E. Morris (hereinafter alternatively

referred to as "Morris") as a candidate for the Conservative Party nomination for Member of the Assembly for the 93rd Assembly District, State of New York. Written objections to the designating petition, and specifications in support of those objections, were duly filed in the office of the Board of Elections in the County of Westchester (hereinafter "Board of Elections") by James P. Cannon (hereinafter "Cannon").

After reviewing the petition and Cannon's objections, the Board of Elections found that the "Statement of Witness" required by Section 6-132 of the Election Law was improperly executed since the Assembly District of residence of each of the subscribing witnesses executing that statement had been omitted. By letter dated August 2, 1978 Cannon and Morris were notified that the objections had been sustained and that the name of Charles Morris would not appear on the primary ballot.

Challenging this determination, Morris instituted a proceeding pursuant to Article 16 of the New York State Election Law in Supreme Court, Westchester County seeking, inter alia, an order validating his designating petition and directing the Board of Elections to place his name on the ballot for the then imminent election. Named as Respondents in this proceeding were the Board of Elections, Albert Capellini (another candidate for the Conservative Party nomination for the same Assembly District seat) and the Objector Cannon.

The lower court granted the petition and directed the Board of Elections to reinstate Morris' name on the primary ballot [8a-17a]*. In doing so, that Court declined to follow well settled case law which mandated uniform and strict compliance with election law require-

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* Page references, unless otherwise noted, refer to the petition for certiorari and the appendix accompanying that petition.

ments [Matter of Vari v. Hayduk, 42 NY 2d 980, 398 NYS 2d 415 (1977), Matter of Rutter v. Coveney, 38 NY 2d 993, 384 NYS 2d 437 (1976)], and opined that pursuant to the newly recodified Election Law, the failure to include in a designating petition the assembly district of residence of subscribing witnesses was a "non-absolute and nonprejudicial technicality". Respondents appealed.

Rejecting the notion that the rule of uniform and strict compliance had been abrogated by the recodification of the Election Law, the Appellate Division, Second Department unanimously reversed the lower court's order and dismissed Morris' petition [18a-19a]. Morris then appealed to the New York Court of Appeals.

Confirming its prior decisions, New York State's highest court unanimously ruled that the language and intent of the subject statute, which it had previously interpreted as imposing a

mandatory, uniform, statewide requirement that subscribing witnesses to a designating petition list their correct assembly district of residence, remained unchanged by the recodification of the Election Law, [20a-21a]. Accordingly, the Appellate Division's order dismissing Morris' petition was affirmed.

ARGUMENT

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED

Morris' failure to raise the question of the constitutionality of §6-132 of the Election Law before the New York Court of Appeals.*

Although arguably raised in Supreme Court, Westchester County, the constitutional issue framed in the instant petition was not ruled upon there. Rather, that court concluded that the recent recodification of §6-132 legislatively overruled the uniform and strict compliance construction given by the Court of Appeals to the statutory predecessor to that section. Based upon this determination the lower court declined

*In Anderson v. Neuberger, consolidated herewith, the constitutional issue was concededly not raised until leave to appeal was sought to the New York Court of Appeals [6]. Where the constitutional issue is not raised below, the Court of Appeals will not consider it Wein v. Levitt, 42 NY 2d 300, 306, 397 NYS 2d 758, 762 (1977); Cohen and Karger, Powers of the New York Court of Appeals at p. 641. As a result, the jurisdiction of this court may not attach. Bailey v. Anderson, 326 US 203, 206-207 (1945).

to follow established precedent and held that the omission of the assembly districts of residence of the subscribing witnesses did not invalidate the designating petition [8a-17a].

Apparently content with having prevailed on state law grounds, petitioner abandoned the federal constitutional claim. Thus on appeal to both the Appellate Division and the Court of Appeals petitioner's argument focused exclusively upon the proper construction to be given §6-132 of New York State's Election Law.

Presented solely with an issue of statutory interpretation, both the Appellate Division and the Court of Appeals held that §6-132, as did its predecessor provision, imposed a uniform statewide requirement that a subscribing witness to a designating petition list his current assembly district of residence [20a - 21a].

Neither the Appellate Division nor the Court of Appeals was ever asked to consider whether that statute, as so construed, imposed an unconstitutional burden upon the exercise of First Amendment rights. Nor is there any mention of that issue in either of the courts' opinions [18a-19a; 20a-21a].

Under these circumstances, the petition for certiorari should be denied. It is well settled that this court will decline to adjudicate the constitutionality of a state statute where that question has neither been presented to nor passed upon by that state's highest court. See e.g. Adickes v. S.H. Kress and Company, 398 U.S. 144, 147 n.2 (1970); McGoldrick v. Compagnie Generale Transatlantique, 309 U.S. 430 (1940).

In a vain effort to avoid this result, petitioner alleges that the constitutional issue presented in the instant petition was raised at page 12 of his brief in the Court

of Appeals [6]. However, an examination of that page (See Appendix to this Brief at A1) compels the opposite conclusion. Although the words "constitutional question" may be found on that page, the context in which the terms appear in no way relates to the issue belatedly posed in this Court.

The absence from this proceeding of the New York State Attorney General provides further evidence that the constitutionality of the Election Law provision at issue here was never properly challenged in state court. Where a state statute is attacked on constitutional grounds, courts in New York State as well as the party making the attack must give official notice to the State Attorney General and permit him to intervene in support of the statute's constitutionality. Civil Practice Law and Rules 1012(b); Rules of Practice of the New York Court of Appeals, 22 NYCRR 500.2. Neither the

petitioner nor any court which considered this case issued the required notice to the Attorney General.

Equally unavailing is Petitioner's attempt to separate the Court of Appeals' interpretation of Election Law §6-132 from the words of the statute itself by challenging the former while conceding the constitutionality of the latter [8]. Manifestly, the construction given to this statute by New York State's highest court is as much a part of that statute as the express language enacted by the Legislature. National Association for the Advancement of Colored People v. Button, 371 U.S. 415, 422 (1963); Winters v. New York, 333 U.S. 507, 514 (1948). Moreover, that construction is presumed to be correct and is binding upon this court. Hortonville Joint School District v. Hortonville Education Association, 426 U.S. 482, 488 (1976).

Finally, in a concession that the record in the case at bar is inadequate for consideration of the supposed constitutional issue belatedly raised here, Petitioner seeks a remand to the New York Court of Appeals for the development of additional facts bearing upon the purposes and operation of the statute in question [8,11]. Of course, this relief is unavailable in the Court of Appeals since the jurisdiction of that Court, with exceptions not here relevant, is limited to review of questions of law. New York State Constitution Article 6, Section 3(a). Under these circumstances, if Petitioner wants a record upon which to litigate his supposed constitutional claim he is at liberty to commence a declaratory judgment action in State Supreme Court. See infra, p.16-17.

Mootness

Petitioner does not challenge the outcome of the general election relating to the Assembly seat for the 93rd Assembly District. Indeed, Petitioner purports not to challenge the constitutionality of the Election Law provision which resulted in the invalidation of his designating petition [7]. But see infra p.14. Yet in reliance upon Storer v. Brown, 415 U.S. 724 (1974) and American Party of Texas v. White, 415 U.S. 767 (1974), petitioner contends that his case presents a live controversy. Petitioner's reliance is misplaced; the case is moot.

Unlike the issues presented in Storer v. Brown, supra, and American Party of Texas v. White, supra, the constitutionality of §6-132 of the Election Law does not present a recurring issue capable of evading review. Under New York procedure the constitutionality of this section may be treated outside the

context of an imminent election in a declaratory judgment action brought in New York State Supreme Court. CPLR §3001; see, Boryszewski v. Bridges, 37 N.Y. 2d 361 365, 372 N.Y.S. 2d 623 (1975). In such a proceeding a full State court hearing on the constitutional issue would be afforded, permitting the development of the complete record, not present here, essential for proper appellate review.

The Constitutional Issue Presented is Meritless

Assuming arguendo, that the issue of the statute's constitutionality were properly before this Court, the statute would clearly be upheld.

The cases cited by petitioner [see e.g. Mandel v. Bradley, 433 U.S. 173, (1977)] stand for the proposition that access to the ballot may not be unduly burdened by onerous technical state law requirements. As expounded by this Court, the applicable test of constitutionality is

whether,

> "[I]n the context of [New York] politics could a reasonably diligent . . . candidate be expected to satisfy the [ballot access] requirements or will it be only rarely that [such] candidate will succeed in getting on the ballot?"

Storer v. Brown, supra, 415 US, at 742.

Here, there was no onerous burden to overcome; rather, there was merely a lack of due diligence by the petitioner.

The relevant requirement of §6-132 of the Election Law is simple. A witness who subscribes to the authenticity of signatures of registered voters on a prospective candidate's designating petition must complete a written statement verifying that he or she is a duly enrolled voter of the same party as the voters qualified to sign the petition and that he or she resides in the political subdivision for which the public office was established. Thus, the statement requires that the subscribing witness' name, party affiliation and address including the Assembly District

of residence be set forth. Election Law §6-132(2) [22A - 25A].

For the past several years the Court of Appeals has interpreted this requirement as mandating strict and uniform compliance in order to facilitate the discovery of irregularity and fraud in designating petitions. Matter of Sciarra v. Donnelly, 34 NY 2d 970, 360 NYS 2d 410 (1974), Matter of Rutter v. Coveney, supra; Matter of Vari v. Hayduk, supra. That the Court of Appeals would follow this well-settled rule in Petitioner Morris' case was hardly surprising.

Nevertheless, the petitioner's designating petitions failed to comply with §6-132 (2) of the Election Law. None of the subscribing witnesses to that designating petition listed the Assembly District of their residence. Unquestionably, the necessary information was readily obtainable, and imposed no burden whatsoever on the

petitioner or those who might vote for him. The Constitution affords no remedy for carelessness.

CONCLUSION

The writ of certiorari should be denied.

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APPENDIX

APPENDIX

REPRINT OF RELEVANT PORTIONS OF PAGES
11 AND 12 OF PETITIONER'S BRIEF IN THE
NEW YORK COURT OF APPEALS

"It is most respectfully submitted that because the statute provides the precise form of the petition, the rule enunciated in Vari, if it is adhered to results in misleading persons who would participate in the democratic process by being candidates for election and who, applying common logic and common understanding of language, will often conclude that in counties such as Westchester the Assembly District is not required (particularly where it is not required for signors, by the very terms in the statute), and will be subject to technical invalidation of their petitions while the "insiders" who know the "truck" will of course be able to satisfy the hypertechnical requirement. Even if the Legislature had intended this result there would be a profound constitutional question with respect to its rationality. It is most respectfully submitted however that where the statute may be read in the way the appellant urges, it is even more profoundly wrong for this Court to create the hypertechnical requirement in a situation where it is meaningless.

The election law does not require a subscribing witness to provide his Asssembly District number in his statement except where that number identifies his election district. Accordingly, the petition here strictly complied with the statute as written, and the petitioner should be restored to the ballot."